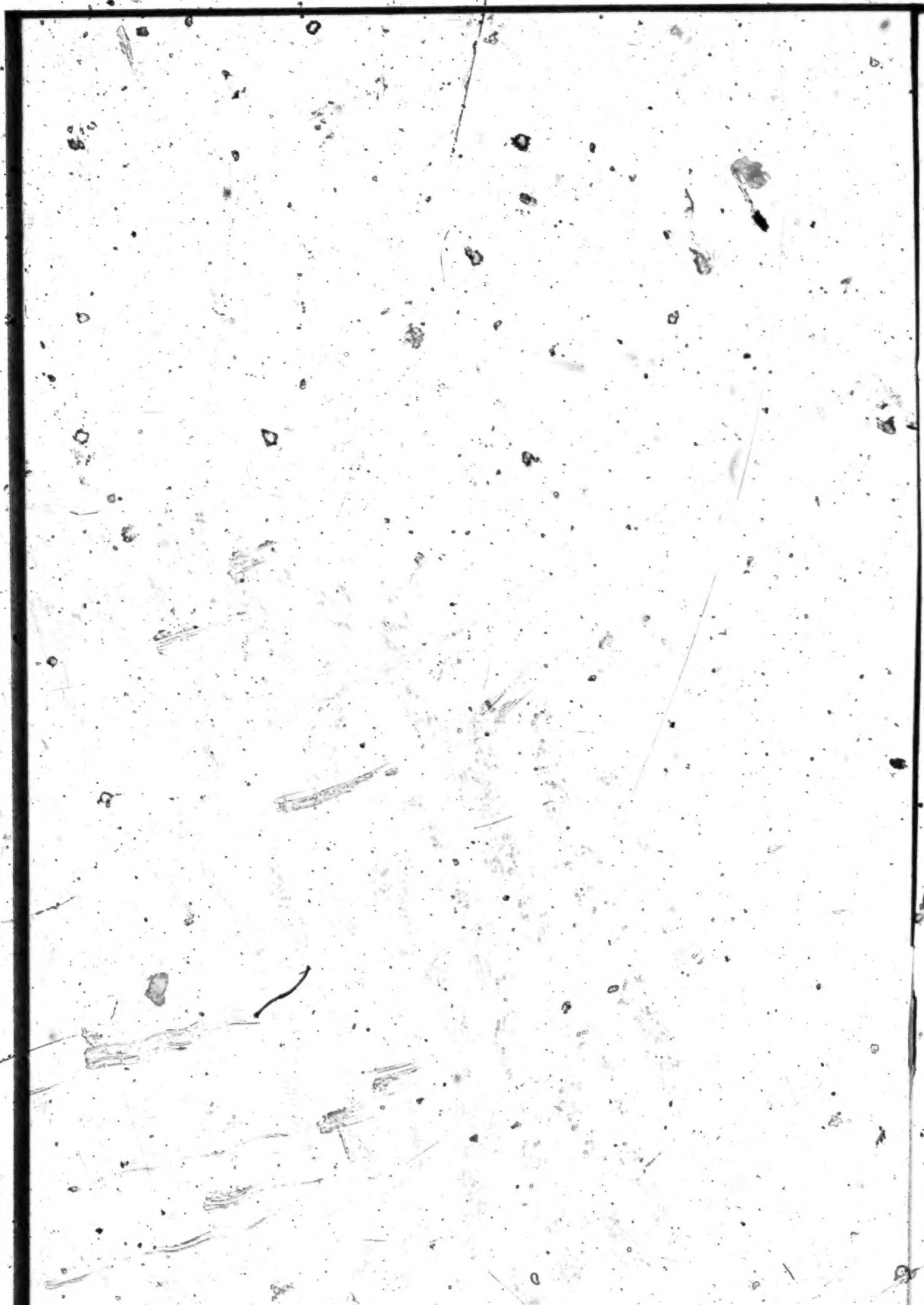

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 301

WEBSTER BIVENS,

Petitioner,

v.

SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the district court (A. 35-40) reaffirming its initial memorandum and order dismissing the complaint (A. 34) is reported in 276 F. Supp. 12. The opinion of the court of appeals affirming the judgment (A. 44-59) is reported in 409 F.2d 718.

JURISDICTION

The judgment of the court of appeals (A. 61) was entered on April 10, 1969 and a petition for a writ of certiorari was filed on May 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

28 U.S.C. § 1331(a):

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

QUESTIONS PRESENTED

1. Whether violation of the constitutional right to be secure from unreasonable search and seizure gives rise to a federal claim for damages.

2. Whether the defense of governmental privilege extends to federal officers clearly violating constitutional rights and acting manifestly beyond the scope of authority.

STATEMENT OF THE CASE

At about 6:30 A.M. on the morning of November 26, 1965 the six respondents, as agents of the Federal Bureau of Narcotics, forced their way into Bivens' home with drawn firearms and proceeded to search the premises. The agents forcibly handcuffed Bivens in the presence of his wife and children, placing him under arrest for violation of the narcotics laws. They threatened to arrest the entire family.

They then took Bivens away to be questioned, fingerprinted, photographed and booked, as well as subjected to a thorough and humiliating search of his person. At all times the agents acted without the authority of a search or arrest warrant. A complaint against Bivens was dismissed by a United States Commissioner. (A. 1-2, 28-29, 46).

Bivens, acting *pro se*, brought a civil suit for damages against the unknown agents in the United States District Court for the Eastern District of New York, alleging violation of his constitutional rights under the Fourth Amendment. The complaint sought damages for humiliation, embarrassment and mental suffering in the amount of $15,000 from each of the defendants (A. 2). On defendants' motion, the district court dismissed the complaint. It concluded that a damage claim could not be sustained where no express constitutional or statutory provision afforded such a remedy and where the defendants were acting in the performance of duty (A. 34-40). The judgment was affirmed by the United States Court of Appeals for the Second Circuit which held that, absent legislation granting such a remedy, the Fourth Amendment standing alone does not provide a basis for a federal damage claim arising out of an unconstitutional search and seizure (A. 45-59).

SUMMARY OF ARGUMENT

I. The federal courts have traditionally enforced constitutional rights without any statutory provision for a remedy. This is well established by decisions upholding jurisdiction for violation of voting rights and a long line of cases awarding equitable relief to protect constitutional rights. Federal damage claims have heretofore not been raised because traditional pleading conventions considered unconstitutionality pertinent only to the defense of justification and disallowed anticipation of defenses in actions at law.

The Fourth Amendment was intended by the framers to be enforced against government officers by damage actions

governed by federal law. The framers' intent cannot be disregarded when existing remedies under state law have become completely impotent because of uncertainty as to the right to meaningful recovery. Unless uniform federal law applies, identical conduct in an unconstitutional search and seizure will entail liability if committed by a state but not by a federal officer, and if committed in one jurisdiction but not in another. A federal claim cannot be denied out of deference to Congress where no intent to preclude a remedy has been expressed and constitutional rights are at stake.

Federal jurisdiction over claims based on constitutional rights has been recognized by a long line of cases both for damages and equitable relief. Denying jurisdiction would only delay settlement of a suit subject to removal, and perpetuate the anomaly of suing federal officers in state court while state officers are sued in federal court under the Civil Rights Act.

II. Government officers have traditionally been held personally liable for wrongful invasion of private property. The notion that they enjoy a privilege for manifestly unauthorized conduct is based on a misreading of decisions protecting the legitimate exercise of discretion. The discretionary immunity doctrine does not erect a protective shield around executive conduct comparable to that accorded the judiciary. The established law on privilege bars liability for a search and seizure reasonably believed valid even though later held unconstitutional. That is all the officer can reasonably claim and society can afford to give. The public interest in vigorous law enforcement must be reconciled with other values and the dominant interest is on the side of the victim when constitutional rights have been violated.

ARGUMENT

I. VIOLATION OF THE CONSTITUTIONAL RIGHT TO BE SECURE FROM UNREASONABLE SEARCH AND SEIZURE GIVES RISE TO A FEDERAL CLAIM FOR DAMAGES.

The complaint alleges an invasion of Bivens' home by the defendant officers without a search warrant in violation of his right to be secure from unreasonable search and seizure. See, *e.g.*, *Agnello v. United States*, 269 U.S. 20 (1925). The complaint having raised a substantial question arising under the Constitution, jurisdiction has been properly invoked under 28 U.S.C. § 1331(a). *Bell v. Hood*, 327 U.S. 678 (1946).

The possibility of a federal damage claim for an unconstitutional search and seizure was recognized in *Bell v. Hood*, *supra*, where this Court upheld federal question jurisdiction in a suit against individual FBI agents. In an opinion by Mr. Justice Black, the Court defined the issue as "whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments" and affirmed that this question "has never been specifically decided by this Court." But, in remanding the case, the Court pointed out that jurisdiction had been sustained in damage suits for deprivation of voting rights in violation of the Constitution and in equity suits for injunctions to protect rights safeguarded by the Constitution, and that from the beginning courts have been alert to adjust their remedies to grant necessary relief where federally protected rights have been invaded. 327 U.S. at 684.

A. Judicial Enforcement of Constitutional Rights

The federal courts have traditionally enforced constitutional rights without any statutory provision for a remedy. In *United States v. Lee*, 106 U.S. 196 (1882), the plaintiff sued individual officers in ejectment to recover land taken without compensation. This Court affirmed a judgment

returning possession to the plaintiff. Quoting the Fifth Amendment, it declared:

> "Undoubtedly those provisions of the Constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them." 106 U.S. at 218.

The Court regarded enforcement of the Fifth Amendment by the traditional remedy of ejectment as standing on the same ground as issuing writs of habeas corpus to protect constitutional liberty. 106 U.S. at 218-20.

In *Wiley v. Sinkler*, 179 U.S. 58 (1900), the plaintiff sued election officials in federal court for damages for denial of his right to vote in a congressional election. Upholding jurisdiction to hear the claim, this Court declared that the right to vote had "its foundation in the Constitution of the United States." 179 U.S. at 62. In a similar case, *Swafford v. Templeton*, 185 U.S. 487 (1902), the Court reaffirmed that the suit arose under the Constitution, insisting that "the action sought the vindication or protection of the right to vote for a member of Congress, a right . . . 'fundamentally based upon the Constitution . . . .'" 185 U.S. at 492. Although the voting rights decisions were addressed to jurisdiction rather than the right to relief, other precedents expressly recognize a constitutional basis for a claim to damages. In *Jacobs v. United States*, 290 U.S. 13 (1933), a suit for damages caused by flooding, this Court said of the right to compensation:

> "That right was guaranteed by the Constitution . . . The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States." 290 U.S. at 16.

See also *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 646, 648-49 (1911).

By far the most impressive authority for judicial enforcement of private claims under the Constitution is the long line of decisions granting equitable relief to protect constitutional rights. In *Ex parte Young*, 209 U.S. 123 (1908), the plaintiff sued to enjoin enforcement of an allegedly unconstitutional rate statute. In sustaining jurisdiction without diversity of citizenship, this Court rejected the argument that no question arising under the Constitution was presented to otherwise support federal jurisdiction. After ruling the challenged statutory provisions were unconstitutional, it declared:

> "The question that arises is whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investigation of the problem and . . . [an] injunction . . . ." 209 U.S. at 149.

This question the Court answered in the affirmative. See also, *e.g.*, *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912); *City of Mitchell v. Dakota Central Tel. Co.*, 246 U.S. 396, 407-08 (1918); *Central Kentucky Natural Gas Co. v. Railroad Comm'n*, 290 U.S. 264, 269-72 (1933); *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952).

The court below was impressed by the paucity of decisions sustaining federal damage claims for constitutional violations (A. 55). What is significant, however, is not that such claims have been rejected by the courts. They have not been raised for decision. This cannot be because damage claims have somehow been assumed less "federal" than equitable claims. The more plausible answer lies in the traditional pleading conventions which prevailed prior to the advent of code pleading. See Hill, *Constitutional Remedies*, 69 Colum.L.Rev. 1109, 1128-31 (1969). In a trespass action at law, the traditional declaration could allege only the plaintiff's interest and the defendant's intrusion. That the defendant was discharging an official duty was a defense which could be raised only in the answer. That the action was nevertheless unconstitutional was an attack on this defense

to be made in the replication. See *Chaffin v. Taylor*, 114 U.S. 309, 309-10 (1884); Hill, *supra* at 1128, and authorities cited therein. For federal question jurisdiction, requiring that the federal basis appear on the face of the complaint, only necessary allegations were considered and the anticipation of defenses was disallowed. Thus a damage action for a constitutional violation was always cast in terms of a state-created right and had to be brought in state court because the federal right could not be pleaded in the complaint. This was, of course, not the situation in equity. The traditional bill could anticipate defenses and had to set forth the constitutional claim in order to justify the extraordinary grant of equitable relief. See *Ex parte Young*, *supra*, 209 U.S. at 129-31; Hill, *supra* at 1129, and authorities cited therein.

B. Fourth Amendment Claims Governed by Federal Law

It is well known that the Fourth Amendment had its origin in English law in the landmark case of *Entick v. Carrington*, 19 How.St.Tri. 1029 (1765), a trespass action against the King's messengers for an unreasonable search and seizure. It is also clear beyond doubt that the framers intended the constitutional guarantee in this country to be enforced by damage actions against government officers. In urging adoption of the Bill of Rights, Madison affirmed his oft-quoted conviction that:

> "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." I Annals of Congress 439 (1789)

What he had in mind for unlawful search and seizure was not the exclusion of illegally seized evidence. For "when the Fourth Amendment was adopted, the rules governing arrests and searches were enforced only by direct remedies such as suits for damages for false imprisonment or trespass." Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, [1960] Sup.Ct.Rev. 46, 54. In the leading case of *Boyd v. United States*, 116 U.S. 616 (1886), this Court quoted the words of Lord Camden in *Entick v. Carrington, supra*, that "No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing," and declared that the *Entick* decision was the source of the Fourth Amendment and its principles affected the very essence of constitutional liberty and security. 116 U.S. at 626-30. See also *Berger v. New York*, 388 U.S. 41, 49 (1967).

The court below, though recognizing the framers' intent that the Fourth Amendment be enforced by private damage actions, concluded that the remedy contemplated was not "a wholly new federal cause of action founded directly on the Fourth Amendment" but "the common law action of trespass, administered in our judicial system by the state courts."[1] Thus the question was simply another instance of enforcement of a constitutional provision "in the state courts, under remedies created by state law" (A. 49). A federal damage claim was not essential to effective enforcement because existing remedies "substantially vindicate" the interests protected by the Fourth Amendment (A. 58). To recognize such a claim would lead down a "long and uncertain road" in developing "a body of federal common law". The closely balanced policy decisions concerning the manner of enforcing a federal right "normally should be left to Congress". (A. 58-59)

[1]Harking back to formalistic pre-code pleading which regarded constitutional claims as pertinent only to the defense of justification, the court noted that the Amendment "serves to increase the efficacy of the trespass remedy by preventing federal law enforcement officers from justifying a trespass as authorized by the national government." (A. 49).

The basic flaw in the court of appeals' analysis is the confusion between (i) the source of law which gives rise to the claim and (ii) the form of the action and the forum in which it is asserted. In the first instance, the question is not whether the framers contemplated actions in common law trespass before federal or state tribunals. It is whether, as a matter of substantive law, the plaintiff's claim in such actions was intended to be governed and secured by federal law derived from the Fourth Amendment or by state law based on varying notions of personal tort liability. The answer to this question is compelled by the Fourth Amendment itself. The framers were not content to leave the freedom from unreasonable searches and seizures as a common-law right, albeit definitively established by *Entick v. Carrington*. They insisted on elevating that freedom to a constitutional guarantee, thereby establishing a right which could not be diluted or negated by state, or even federal, law. Clearly this was no mere promise of a right without a remedy, a statement of principle hopefully to be honored by the Executive and implemented by the Legislative branches. With the *Entick* case in mind, it was meant as a guarantee to be jealously protected by the courts, state and federal, by enforcement of damage claims against individual government officers. Above all, it was a constitutional not a common-law guarantee. It was meant to be respected as paramount law by the courts in cases properly before them. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). As such, whether the guarantee has been violated is a federal question. Whether and how it is enforced is a matter of federal concern. To conclude otherwise is to ignore the history of the Fourth Amendment and leave enforcement of the rights secured thereby subject to the changing rules of the common law as though there were no constitutional guarantee.

The framers' intent cannot be disregarded on the court of appeals' comforting assumption that existing remedies "substantially vindicate" the freedom guaranteed by the Fourth Amendment. The exclusionary rule removes the

incentive for unlawful searches specifically intended to secure evidence needed for prosecution but in no way deters such abuses where the purpose is unclear or even unrelated to prosecution. See *Irvine v. California*, 347 U.S. 128, 135-36 (1954); ALI, *Model Code of Pre-Arraignment Procedure*, Tent.Draft No. 3, Part II—"Search and Seizure", pp. xix-xx (1970); *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966) (over 300 illegal searches to capture suspected police killer). The rule only protects one against whom incriminating evidence is discovered and then simply as a shield against further abuse in prosecution. It does nothing for the innocent victim of a fruitless search and in no way compensates either the guilty or innocent for invasion of their Fourth Amendment rights. The only way to vindicate such rights is by the traditional damage action against the individual officers concerned. The dearth of such suits under state law suggests not that Fourth Amendment rights are being "substantially vindicated" but that the traditional trespass remedy has become "completely impotent", Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493, 498 (1955), and "worthless and futile". *Mapp v. Ohio*, 367 U.S. 643, 652 (1961). The reason cannot be simply that victims swallow their outrage in silence out of anticipation that a jury will be reluctant to penalize police officers (A. 58). The plain fact is that in most states the law governing unlawful searches and seizures is at best unclear and at worst inadequate. Wholly apart from uncertainties as to the defendant's immunity, the various local rules on damages leave the prospect of meaningful recovery very much in doubt. See *Wolf v. Colorado*, 338 U.S. 25, 42-44 (1944) (Murphy, J., dissenting); *Basista v. Weir*, 340 F.2d 74, 86-87 n.11 (3d Cir. 1965); *Mason v. Wrightson*, 205 Md. 345, 109 A.2d 129 (1954) (one cent damages for illegal search of person in public); Foote, *supra* at 498. The basic problem is that in most jurisdictions the common law of trespass has developed in the context of intrusions by private citizens rather than

the more serious abuses by government agents. Thus, in concurring in *Monroe v. Pape*, 365 U.S. 167 (1961), Mr. Justice Harlan observed:

> "Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land. It would indeed be the purest coincidence if the state remedies for violation of common-law rights by private citizens were fully appropriate to redress those injuries which only a . . . [government] official can cause and against which the Constitution provides protection." 365 U.S. at 196 n.5.

But enforcement of the Fourth Amendment cannot be left to coincidence. The remedy for violation of a federal guarantee cannot be left impotent and worthless because of the inadequacies of state law.

Recognition of a federal claim would not, as feared by the court below, lead down a "long and uncertain road" in developing

> "a body of federal common law governing such questions as the types of damage recoverable, the types of injuries compensable, the extent to which official immunity is available as a defense, and the degree of evil intent which is necessary to state a meritorious cause of action" (A. 58-59).

The road has already been well-travelled in federal suits against state officers under the Civil Rights Act, 42 U.S.C. § 1983, considering in particular each of the questions cited by the court. See, *e.g.*, *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965) (damages recoverable and injuries compensable); *Pierson v. Ray*, 386 U.S. 547 (1967) (immunity); *Monroe v. Pape, supra*, 365 U.S. at 187-88 (1961) (intent); *O'Sullivan v. Felix*, 233 U.S. 318 (1914) (statute of limitations). Thus recognition of a federal claim "does not require the fashioning of a whole new body of federal law, but merely removes a bar to access" to existing law. *Moragne v. States*

Marine Lines, Inc., 398 U.S. 375, 405-06 (1970). Such recognition, moreover, is necessary to eliminate unjustifiable "anomalies of present law". *Ibid.*, 398 U.S. at 395. Otherwise, identical conduct violating the constitutional freedom from unreasonable search and seizure will entail liability if committed by a state officer but not if by a federal officer. Identical conduct by a federal officer will entail liability if committed in one jurisdiction but not in another. Vindication of constitutional rights will depend upon which badge the defendant is wearing or on which side of a particular state boundary he happens to act.

The framers' intent and the need for a federal remedy cannot be denied simply out of deference to Congress. Rules of tort liability in trespass have traditionally been developed by the courts. New legislation in such well-charted waters might well be limited to a counterpart of 42 U.S.C. § 1983 for acts "under color of" federal law. The federal courts would then be left with the same task they face now. Congress has given "no affirmative indication of an intent to preclude the judicial allowance of a remedy", *Moragne v. States Marine Lines, Inc.*, *supra*, 398 U.S. at 393, and none can fairly be implied from the remedy granted by 42 U.S.C. § 1983 for misconduct under color of state law.[2] Withholding a federal remedy simply as a matter of judicial restraint cannot be justified where constitutional rights are at stake. Compare *Wheeldin v. Wheeler*, 373 U.S. 647 (1963). The fact is that Congress has not acted and may not act, particularly with political pressures running against restraints on police conduct. See *District of Columbia Court Reform and Criminal Procedure Act of 1970*, P. L. 91-358 § 23-591, 84 Stat. 473, 630 (authorizing "no-knock" entry). Protection of constitutional rights cannot turn on the vagaries of public opinion. As anticipated by the framers, it is

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[2]The statutory remedy was enacted as part of the Civil Rights Act of 1871 which was understood as necessary "to enforce the provisions of the Fourteenth Amendment." 17 Stat. 13. See *Monroe v. Pape*, *supra*, 365 U.S. at 171.

the courts "which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." *Weeks v. United States*, 232 U.S. 383, 392 (1914). And it is the courts which must insure that such rights are maintained.

Thus the issue raised is nothing less than the proper role of the judiciary where constitutional rights have been violated by agents of the Executive and no remedy has been provided by the Legislative. But the question is not whether to create tort liability for conduct that is otherwise not actionable or to fashion a new remedy where none before existed. Compare *Wheeldin v. Wheeler, supra; J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). Nor is it whether to override a substantial state interest that even arguably should be respected in a federal system. Compare *Monroe v. Pape, supra; Mapp v. Ohio, supra.* It is not even whether the remedy should be given by a federal rather than a state court since any state suit will almost certainly be removed to federal court under 28 U.S.C. § 1442(a). The question is simply whether the plaintiff's claim is to be governed by federal law which will vindicate his rights under the Fourth Amendment or by the prevailing notion of trespass liability in the state where suit happens to be brought. As to this, the intent of the framers is clear. The inadequacy of existing remedies under state law is clear. The answer to the question itself is clear in the decisions of this Court recognizing claims for equitable relief to protect constitutional rights. The conclusion cannot be different simply because the claim is for damages. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief:" *Bell v. Hood, supra*, 327 U.S. at 684.

C. Jurisdiction Over Fourth Amendment Claims

Federal jurisdiction over claims based on constitutional violations was recognized not only in the two voting rights cases, *Wiley v. Sinkler, supra; Swafford v. Templeton, supra,* but also in the long line of decisions in suits for equitable relief. See, *e.g., Ex parte Young, supra.* The mandate of 28 U.S.C. § 1331(a) to hear "all civil actions" arising under the Constitution can hardly be sufficient to sustain jurisdiction where the claim is for equitable relief but not where it is for damages.[3] Notwithstanding common law pleading conventions, it is clear that "a short and plain statement of the claim" under Fed.R.Civ.P. 8(a) includes the allegation that the plaintiff's constitutional rights have been violated, regardless of the relief requested. And it is clear that the case "arises under" the Constitution because the plaintiff's claim that he has been subjected to an "unreasonable" search or seizure will be sustained if the Constitution is given one construction and defeated if it is given another. *Bell v. Hood, supra,* 327 U.S. at 685; *Powell v. McCormack,* 395 U.S. 486, 514 (1969).[4]

Denying jurisdiction will serve no useful purpose in suits against federal officers. If the plaintiff is required to sue in state court, the defendant will almost invariably have the case removed under 28 U.S.C. § 1442(a). Such suits always involve the officer's defense of immunity and "one of the primary purposes" of the removal statute was "to have such defenses litigated in the federal courts." *Willingham v. Morgan,* 395 U.S. 402, 407 (1969). Thus, denying jurisdic-

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[3]The mandate was in terms of "all suits of civil nature, at common law or in equity", 28 U.S.C. § 41(1) (1940 ed.), prior to its amendment in 1948 to conform to Fed.R.Civ.P. 2.

[4]In the event this Court concludes that the plaintiff does not have a federal claim for damages, it should deny the defense of governmental privilege and remand the case to the district court for determination of his claim under state law. See *Hurn v. Oursler,* 289 U.S. 238 (1933).

tion will achieve nothing in judicial economy and serve only to delay determination of the plaintiff's claim. In addition, far from serving any legitimate state interest, it will merely perpetuate the anomaly of suing federal officers in state court while state officers are sued in federal court under the Civil Rights Act, 42 U.S.C. § 1983.

II. THE DEFENSE OF GOVERNMENTAL PRIVILEGE DOES NOT EXTEND TO FEDERAL OFFICERS CLEARLY VIOLATING CONSTITUTIONAL RIGHTS AND ACTING MANIFESTLY BEYOND THE SCOPE OF AUTHORITY.

The alleged search and seizure constituted a clear violation of Bivens' rights under the Fourth Amendment. It was manifestly beyond the bounds of any authority conferred under 26 U.S.C. § 7607 and punishable by criminal penalties under 18 U.S.C. § 2236. Nevertheless, the government insists the defendants are immune from suit because exposing federal officers to personal liability would inhibit vigorous and effective discharge of their duties.[5] The district court sustained such immunity as an alternative ground for dismissing the complaint (A. 34, 40). The court of appeals never reached the question, concluding that the complaint failed to state a valid claim (A. 47). The question is a matter of federal law. *Howard v. Lyons*, 360 U.S. 593, 597 (1959).

[5] In the court below the government argued in its brief—"Even assuming, *arguendo*, that appellant had alleged a clear, conscious violation of his Fourth Amendment rights, the agents would still be immune from civil liability."

A. Personal Liability at Common Law

At common law it was well established that government officers were personally liable for wrongful invasion of private property. In trespass actions the question was traditionally not one of immunity but whether the officer was acting in the discharge of his duty and in accordance with authority validly conferred. See, *e.g.*, *Entick v. Carrington, supra; Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851); *Bates v. Clark*, 95 U.S. 204 (1877). The claim that such officers were shielded by the government's sovereign immunity was repeatedly rejected:

> "[T]he exemption of the United States from judicial process does not protect their officers and agents . . . from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States." *Belknap v. Schild*, 161 U.S. 10, 18 (1896).

See also *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619 (1912). In denying immunity to a government-owned corporation, Mr. Justice Holmes proclaimed "one of the first principles" of our system of law:

> "that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him . . . . An instrumentality of government he might be, and for the greatest ends; but the agent, because he is agent, does not cease to be answerable for his acts." *Sloan Shipyards Corp. v. United States Shipping Bd. Emer. Fleet Corp.*, 258 U.S. 549, 567 (1922).

B. The Doctrine of Discretionary Immunity

The surprising notion that government officers enjoy a privilege or immunity for manifestly unauthorized conduct is based on a misreading of this Court's decisions protecting the legitimate exercise of discretion. The leading case is *Spalding v. Vilas*, 161 U.S. 483 (1896), a suit against the Postmaster General for distribution of an allegedly defamatory circular. After thoroughly analyzing the defendant's conduct, this Court concluded that it was "not unauthorized by law, nor beyond the scope of his official duties". 161 U.S. at 493. Turning then to whether liability could nevertheless be imposed if he had acted maliciously, the Court concluded:

> "As in the case of a judicial officer, we recognize a distinction between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision . . . . In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages . . . . In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty, as Postmaster General. The motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial." 161 U.S. at 498-99.

This absolute privilege was extended to lesser executive officers in *Barr v. Matteo*, 360 U.S. 564 (1959), a suit against an official of the Rent Stabilization Agency based on an allegedly defamatory press release. Mr. Justice Harlan stated the rationale underlying the privilege and concluded that it should not be restricted to officers of cabinet rank:

> "It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies . . . and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government . . . .
>
> "It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' Spalding v. Vilas, supra (161 U.S. at 498)—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity . . . ." 360 U.S. at 571, 573-74.

He then concluded that the privilege was applicable because the press release publication was an appropriate exercise of discretion and "within the outer perimeter" of the defendant's "line of duty". 360 U.S. at 574-75.

Implicit in the *Vilas* and *Barr* decisions is the assumption that the privilege will not shield conduct manifestly beyond the scope of authority. This was recognized in *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), a suit against a federal investigator who had issued an unauthorized subpoena. The Court said the defendant "was not acting sufficiently within the scope of his authority to bring the doctrine into play." In dissent, Mr. Justice Brennan agreed that the defense had never shielded conduct beyond the outer perimeter of duty and affirmed that a federal officer "remains liable for acts committed 'manifestly or palpably beyond his authority.'" 373 U.S. at 651, 653. Most of the lower federal court decisions are in accord. See, *e.g.*, *Colpoys v. Gates*, 118 F.2d 16 (D.C. Cir. 1941) (no immunity for marshall's public statements not in line of duty); *Colpoys v. Foreman*, 163 F.2d 908 (D.C. Cir. 1947) (no immunity for marshalls' forcible entry in executing civil process); *Kozlowski v. Fer-*

rara, 117 F. Supp. 650 (S.D.N.Y. 1954) (no immunity for arrest without probable cause). In particular, the courts of appeals for the First and Ninth Circuits have rejected the defense as inapplicable to an unconstitutional search and seizure. See *Kelley v. Dunne*, 344 F.2d 129 (1st Cir. 1965); *Hughes v. Johnson*, 305 F.2d 67, 70 (9th Cir. 1962).

There are, however, a few cases misapplying discretionary immunity to shield manifestly unauthorized conduct. The leading decision is *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965), a damage suit against U.S. Deputy Attorney General Katzenbach and other officers brought in the wake of James Meredith's enrollment in the University of Mississippi. The complaint alleged unlawful arrest and detention without probable cause.[6] The court of appeals affirmed dismissal on the theory that the defendants were acting "within the outer perimeter of their line of duty" and their conduct had "more or less connection with the general matters committed by law to their control and supervision". Their actions also involved a "decision which it is necessary that these officers be free to make without fear or threat of vexations or fictitious suits and alleged personal liability". 332 F.2d at 862.[7] See also *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); *Wheeldin v. Wheeler*, 302 F.2d 36 (9th Cir. 1962), *aff'd on other grounds*, 373 U.S. 647 (1963); *Scherer v. Brennan*, 379 F.2d 609

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[6]Specifically that the plaintiffs (i) were arrested on a public highway without probable cause, (ii) detained for 21 hours, including 18 hours sitting in a rigid position without speaking, eating or drinking, (iii) subjected to vile abuse and mistreatment, and (iv) assaulted with a large stick or billy club. 332 F.2d at 857.

[7]Judge Gewin wrote a vigorous dissent, 332 F.2d at 863. The majority's decision was also rejected by the First Circuit in *Kelley v. Dunne*, *supra*, 344 F.2d at 133.

(7th Cir.), *cert. denied*, 389 U.S. 1021 (1967);[8] *Swanson v. Willis*, 114 F. Supp. 434 (D. Alaska 1953), *aff'd*, 220 F. 2d 440 (9th Cir. 1955) (*per curiam*); *Hartline v. Clary*, 141 F. Supp. 118 (E.D. S. Car. 1956).

C. The Defense of Executive Privilege

The doctrine of discretionary immunity was never intended to erect a protective shield around executive conduct comparable to that accorded the judiciary. The *Vilas* decision was handed down less than one month after this Court reaffirmed the traditional rule of tort liability in *Belknap v. Schild, supra*. It said nothing about discarding established rules as to when conduct is privileged and held simply that otherwise privileged conduct was shielded from judicial inquiry and personal liability based solely on an allegation of malice.[9] To be sure, the Court invoked the analogous doctrine of judicial immunity already recognized in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871). And it reformulated the concept of "clearly no jurisdiction over the subject matter" in *Bradley*, 80 U.S. at 351-52, into "matters which are manifestly or palpably beyond . . . authority", at the same time distinguishing "action having more or less connection with the general matters committed by law to . . . control or supervision" 161 U.S. at 498. But simply drawing an analogy cannot fairly be construed as proclaim-

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[8]On the facts neither the *Gregoire* nor the *Scherer* decisions involved conduct manifestly beyond the scope of authority but in each case the court purported to recognize immunity as though it had. The *Wheeldin* decision did involve such conduct but, as discussed above, its recognition of immunity was reversed by this Court.

[9]The Court quoted at length *Dawkins v. Lord Paulet*, L.R. 5 Q.B. 94, 114 (Mellor, J.): "I apprehend that the motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be. I think the law regards the doing of the duty and not the motives from or under which it is done . . . . Does an action lie against a man for maliciously doing his duty? I am of the opinion that it does not." 161 U.S. at 496.

ing a new "jurisdictional" test for determining executive privilege and suggesting that an officer acting more or less within his jurisdiction is as immune as a judge.[10] The concept of jurisdiction suffices to chart the bounds of judicial privilege because the perimeter is fairly well defined and all matters within it are committed by law to the control or supervision of the judge. But it offers little guidance for determining permissible executive conduct where the perimeter is itself elusive and the commitment less complete. See Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L.Rev. 263, 287-88 (1937); Prosser, *Torts* § 126 at 1018 (3d ed. 1964). In law enforcement, for example, the jurisdictional question is often answered simply by whether the officer was wearing his badge or purporting to act in the name of the government. Its resolving power will pick up a policeman claiming privilege for unwarranted public statements, see *Colpoys v. Gates, supra,* but completely miss the much more serious and common abuses like false arrest and brutality. See *Norton v. McShane, supra.* In particular, unconstitutional searches and seizures by definition have "more or less connection with" law enforcement and are made in the "line of duty". If *Vilas* and *Barr* furnish the standard for executive privilege, wilful violation or disregard of constitutional rights is privileged conduct and nothing remains of the rights recognized in *Entick v. Carrington, supra,* and the enforcement of the Fourth Amendment intended by the framers.

Apart from the misreading of the *Vilas* and *Barr* decisions, the law on executive privilege is fairly well established not only by the older cases in trespass, see *Mitchell v. Harmony, supra; Bates v. Clark, supra;* Restatement (Second) of Torts § 214(1)(1965); Harper & James, *The Law of Torts* § 1.20

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[10]The *Vilas* test was notably not quoted in Mr. Justice Harlan's opinion in *Barr* which emphasized "the duties with which the particular officer . . . is entrusted", 360 U.S. at 573. But the *Barr* standard of "beyond the outer perimeter of line of duty" has been equally misunderstood as a jurisdictional test.

at 57 (1966), but by this Court's recent decision in *Pierson v. Ray*, 386 U.S. 547 (1967). The complaint in *Pierson* sought damages under 42 U.S.C. § 1983 from a judge and police officers for false arrest and imprisonment. This Court reaffirmed the doctrine of judicial immunity recognized in *Bradley v. Fisher, supra*, but pointed out that the common law "has never granted police officers an absolute and unqualified immunity". 386 U.S. at 555. Looking at the officer's discharge of his duty rather than whether he was wearing his badge, the Court held that a policeman who reasonably believes an arrest is valid is not liable for false arrest simply because the suspect is in fact innocent or the statute being enforced is later held unconstitutional. *Ibid.*

The privilege recognized in *Pierson* is sufficiently broad to shield an officer from liability for a search and seizure that he reasonably believes valid even though it is later held unauthorized or unconstitutional.[11] That is all the protection the officer can reasonably claim and it is all society can afford to give. To give more, to shield a warrantless search and seizure where no extenuating circumstances otherwise render it reasonable, would be tantamount to extending the defense of *Pierson* to an arrest without probable cause or under a statute definitively adjudicated unconstitutional, thus establishing the "absolute and unqualified immunity" which this Court specifically denied. Such an arbitrary interference with liberty and property cannot be privileged. This is not because it lacks "more or less connection with" law enforcement or is not in the "line of duty" but because, being a clear violation of constitutional rights and manifestly beyond the scope of authority, it cannot be justified as rea-

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[11] Whether the privilege would withstand an allegation of malice is not at issue here since no malice was alleged. But an impressive number of lower court decisions have regarded the *Vilas* shield against inquiring into motives as not limited simply to defamation. See, *e.g.*, *Gregoire v. Biddle, supra* (L. Hand, J.); *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (2d Cir. 1962) (Medina, J.) *cert. denied*, 374 U.S. 827 (1963).

sonably believed authorized or necessary to the effective discharge of duty.

When the government claims in open court that vigorous law enforcement requires immunity for officers who have wilfully violated constitutional rights, it is time to return to first principles on which our legal system was founded. Obviously law enforcement could be pressed more vigorously without the fear of liability. But here enforcement collides with other, higher values—with the constitutional command that the right to be secure from unreasonable searches and seizures shall not be violated. When that command is ignored, the "dominant interest of the sovereign is then on the side of the victim" who may bring an action to vindicate his rights. *Land v. Dollar*, 330 U.S. 731, 738 (1947). In such an action, it is well to recall that no claim of immunity was or could have been raised in *Entick v. Carrington, supra*, and to recognize that a privilege shielding wilful violation of the Constitution would effectively nullify the rights established by *Entick* and intended by the framers to be secured by the Fourth Amendment.

CONCLUSION

The order of the court of appeals should be reversed.

Respectfully submitted,

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